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In The

Supreme Court of the United States

October Term, 1969

No. 413

GREENBELT COOPERATIVE PUBLISHING ASSOCIATION, INC., and ALFRED M. STOLTZE,

Petitioners,

v.

CHARLES S. BRESSLER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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INDEX

	PAGE
QUESTION PRESENTED	1
STATEMENT	2
Petitioners' Statement	4
The Publications	5
Blackmail Articles	8
News Review Sponsorship of Lawsuit	10
The Covenants Controversy	13
ARGUMENT	14
Out of Context	14
Repetition of False Statements	15
Public Officials and Public Figures	16
Actual Malice	20
Instructions as a Whole	22
Opportunity to Rebut	25
Comparison with *New York Times* and *Butts*	26
The Court of Appeals Decision	28
Petitioners' Appendix A	30
CONCLUSION	31

CITATIONS

Cases

Associated Press v. Walker, 388 U.S. 130 (1967) 16

Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967) 17

City of Greenbelt v. Bresler, 248 Md. 210, 236 A. 2d 1 (1967) 13n

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 16, 17, 18, 19, 21, 22, 27, 28

PAGE

Door v. United States, 195 U.S. 138 (1904) 14

Garrison v. Louisiana, 379 U.S. 64 (1964) 17, 18

Greenbelt Homes, Inc. v. Board of Education, 248 Md. 350, 237 A. 2d 18 (1968) 3

Negley v. Farrow, 60 Md. 158 (1883) 28

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 1, 5, 17, 18, 19, 21, 25, 26, 27

Plenol v. Beuttler, 253 Iowa 259, 111 N.W. 2d 669 (1961) 28n

Rosenblatt v. Baer, 383 U.S. 75 (1966) 17, 18, 21, 23n, 26

Schneidman Heating, Inc. v. New York Plumbers' Specialities Co., 238 App. Div. 318, 264 N.Y.S. 146 (1933) 28n

Seaboard Air Line R. v. Padgett, 236 U.S. 668 22

Time, Inc. v. Hill, 385 U.S. 374 (1967) 18, 25, 26

Williams v. Daily Review, Inc., 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965) 28n

Miscellaneous

American Jurisprudence, Libel and Slander, Vol. 33 15

American Jurisprudence, Newspapers and Press Associations, Vol. 39 15

Prosser, The Law of Torts, 2nd Ed., 1955 16

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the rule of constitutional protection in libel cases, as announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is the only rule applicable in a case involving defamatory criticism of the business activities, but unrelated to the official conduct, of a builder and developer who was also a delegate to the Maryland House of Delegates from a different county, and who later became a candidate for State Comptroller.

STATEMENT

The Greenbelt News Review, a weekly which is published by petitioner corporation, is the only newspaper published in Greenbelt (E. 160). Its circulation is approximately 4,500 copies each week, of which only about 75 are paid subscriptions which are mailed[1] (E. 22); the other copies are delivered free of charge to every house in Greenbelt (E. 20).

The petitioner, Alfred M. Skolnik, is President of the corporation, writes many of the feature articles and editorials, and is one of the five members of the editorial board which edits all the material published. His wife, Elaine, is one of the several housewives who serve as reporters, and she also writes many of the feature articles as well as a weekly column.

Mr. and Mrs. Skolnik are active owner-members of Greenbelt Homes, Inc. (GHI), which once owned all the land involved in the controversies, but sold it at a profit instead of developing it (E. 26). GHI strongly opposed the zoning of adjacent Parcels 1 and 2 for townhouses,[2] although it is building townhouses on its own property (E. 77).

GHI also fought the Board of Education's plan to build a high school on part of Parcels 1 and 2, near its wooden rowhouses, and tried to compel the Board to build the school on more remote and more expensive Parcel 15. It delayed the construction of the school by its unsuccessful suit and appeal "to thwart a Board of Education's choice of

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[1] Respondent tried to purchase a mail subscription, but was told "they didn't mail them out" (E. 94).

[2] This was the zoning recommended by the Maryland National Capital Park and Planning Commission, the county's official planning body, in its Master Plan for the Greenbelt-College Park area.

a school site", *Greenbelt Homes, Inc. v. Board of Education*, 248 Md. 350, 237 A. 2d 18, 19.[3]

Mr. and Mrs. Skolnik are also active members of an unincorporated organization called "Citizens For a Planned Greenbelt" (CFPG), whose only requirement for membership is payment of one dollar (E. 64). CFPG is run by a twenty-member Steering Committee, which includes Mrs. Skolnik, Charles Schwan (President of GHI), Mayor Edgar L. Smith, Albert Herling (who was reported as accusing respondent of blackmail and skulduggery (E. 218)), Marjorie Bergemann and Mrs. Joseph Rosetti (both of whom were elected after they had made the blackmail accusations (E. 212)).[4]

Although much attention at the trial was focused on the two articles in which respondent was accused of blackmail, they were only a part of a series of libelous attacks made on respondent through articles and editorials included in the 45 exhibits placed in evidence by respondent. Several of these attacks were made *before* the blackmail articles, including one article by petitioner Skolnik headlined "City Battles Bresler on 2 Fronts; . . ." and subheaded "Court Suit", which falsely stated that "The City and Bresler will also be at odds this week . . ." (Pl. Ex. 8, E. 227). The article clearly showed that petitioner Skolnik knew the details of the suit, including the fact that Bresler was *not* a party.

Prior to the blackmail articles, there was another article written by petitioner Skolnik about a meeting of the city council, in which he reported (E. 231):

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[3] Ironically, it was GHI President Schwan's statement of an alleged threat by respondent to delay construction of the high school which was followed by the blackmail accusations at the first city council meeting (E. 212).

[4] The Board of Education also threatened to sue CFPG for an allegedly false accusation unless it either proved it or withdrew it and apologized (E. 234-235).

"It took the better part of two hours before the council and the audience decided that it made much more sense to stop attacking each other and concentrate on a common target — Bresler — who wasn't there."[5]

Another article prior to the blackmail articles contains some enlightening background (Pl. Ex. 24-A, E. 76-77). It reported that former (and present) City Councilman Dick Pilski questioned the legality of a "partnership" arrangement between GHI and the city council. He accused each of them and the News Review of "employing sensationalism to such a degree it has 'created panic among citizens' ", by misrepresenting the effect of the master plan developed by the Maryland National Capital Park and Planning Commission for the Greenbelt-College Park area. His "partnership" charge referred to a similar proposal previously made by respondent for the "joint development of a master plan" which the city council had rejected (E. 78), because it could lead to a "conflict of interest".[6]

Petitioners' Statement

Petitioners' statement that this action stems from a heated controversy over zoning and land development in the City of Greenbelt, Maryland, is only partially correct. Several of the 45 exhibits placed in evidence were knowingly false reports of lawsuits allegedly filed against respondent which pertained solely to his *private* activities as a builder and were damaging to his business reputation (E. 223, 227).

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[5] It appeared to be common practice to attack Bresler at city council and other meetings when he wasn't there to defend himself; including the two meetings at which he was accused of blackmail and skulduggery.

[6] No conflict of interest ever developed between the city and CFPG. As Mayor Smith testified on cross-examination (E. 128), neither he nor the city council ever voted contrary to that group's recommendations. He, and Councilman Francis White, and Councilman Cliff Simonson, were on the Steering Committee of CFPG (E. 30).

Respondent also disagrees with petitioners' statement that ". . . it was assumed throughout the trial that the *New York Times* rule was applicable to the articles in issue." That was not the trial court's assumption, as shown by its discussion with petitioners set forth in their brief (p. 16) — although the trial court deferred to petitioners by instructing the jury in the exact language of *New York Times* (E. 207-209). Nor was it respondent's assumption, as none of the articles involved criticism of his *official* conduct, to which the opinion in *New York Times* clearly limited itself.[7] In fact, it was not even petitioners' own assumption, as they tried to get the trial court to rescind the phrase "official conduct" from its *New York Times* instructions (E. 205, 206, 208, 210), despite the unequivocal statement in *New York Times* that it was ". . . a federal rule that prohibits a pubic official from recovering damages for a defamatory falsehood relating to his official conduct . . ." 376 U.S. at 279, 84 S. Ct. at 726.

The Publications

The Amended Declaration alleged that respondent was a builder and developer (E. 1) and that the libels were published, among other reasons, "for the purpose of injuring Plaintiff in his aforesaid business and occupation . . ." (E. 3).

One example of this was Plaintiff's Exhibit 6, which contained the allegation (E. 223):

> "Reportedly, a number of home-owners, both in the Lakecrest and Boxwood developments, have started legal proceedings against Bresler for failure to make

[7] Respondent agrees that *New York Times* is applicable insofar as it relates to the separate concurring opinion of Mr. Justice Goldberg, which said: "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen." 376 U.S. at 301, 84 S. Ct. at 737.

construction corrections in accordance with county standards."

The undisputed testimony of respondent was that no legal proceedings had ever been started against him for failure to comply with county construction standards (E. 94).

Petitioner Skolnik said he and his wife had written the article jointly, but that his wife had written the paragraph in issue (E. 53).

The meeting at which the home-owners "attempted" to air their grievances was not a public one, as alleged in petitioners' brief (p. 9), but a meeting of the group which called itself "Citizens For a Planned Greenbelt" (E. 173). Nor was the discussion held at the meeting, as the chairman said complaints about construction of private homes had nothing to do with planning for Greenbelt and wouldn't listen to them (E. 53-54), although Mrs. Skolnik did after the meeting. Likewise, Mrs. Skolnik's testimony described them as "Boxwood homeowners" (E. 173) — not Lakecrest homeowners.

When asked by deposition and interrogatories before trial for evidence of any legal proceedings which had been started against Bresler prior to the article, the only lawsuit cited by petitioner Skolnik was a suit by a Mr. Foley against Charles Burton Builders, Inc., for rescission of his contract to *purchase* a house from that corporation.

When asked at the trial about suits which had been filed, petitioner Skolnik said (E. 54): "No, I don't know anything about suits. All I know is that people were complaining about the fact that they were having troubles —". He justified the use of the words "legal proceedings" with the contention that "Well, that covers complaints."

Petitioner Skolnik's obvious intention to harm respondent's reputation as a builder by a knowingly false statement is disclosed by his testimony (E. 54): "It was a proper description that people were going to their lawyers *in bunches* and *filing* proceedings about their houses." (Emphasis supplied).

No home-owner said he had "started legal proceedings against Bresler". That was petitioners' own phrase, to lead their readers to believe that suits had been filed against respondent "in bunches". It was not merely reckless disregard of truth, but knowing falsity.

The same article also falsely inferred that Bresler was the defendant in another suit by the city when it stated, in the preceding paragraph (E. 223), that: "The city also resorted to legal action *early in the construction of Boxwood Village* because drainage problems in the development caused damages in the Lakewood subdivision." (emphasis supplied). Petitioner Skolnik had written the previous article about the issue (E. 227); was thoroughly familiar with all the details of the case; knew that the suit was not against Bresler (E. 51) but against Ivy Homes, Inc., (in which Bresler had no interest) and Boxwood Villege, Inc. (in which Bresler had a one-sixth interest); knew that the case had been dismissed against Boxwood Village, Inc., more than a year ago because it was not the owner of the property involved; knew that Ivy Homes, Inc., had consented to a judgment against it — but *repeated* the knowingly false allegation against Bresler *more than a year later*. Petitioner Skolnik's by-line did not appear in the article, as it normally did, but he admitted he and his wife had written it (E. 53).

There were numerous other publications which were intended to expose respondent to public scorn, hatred and

contempt, and to injure him in his business as a builder and developer. They included the article misleadingly headed "Greenbelt Loses First Round on Bresler's 1962 Covenants" by Al Skolnik (which the article discloses pertained to the dismissal of a suit against Twentieth Century Investments, Inc., in which corporation Bresler was not alleged to, nor had, any interest (E. 228); a letter headed "An Unethical Trade" (E. 214); a letter headed "Another Crippling Blow" (E. 22) (by Clifford Simonson, a member of the Steering Committee of CFPG): and a letter headed "Startled at Bresler" (E. 222).

Blackmail Articles

Petitioner Skolnik defended the publication of the first article which accused the respondent of blackmail (Pl. Ex. 1, E. 211-214), on the ground that he was merely reporting what was said by members of the audience at the city council meeting. Although he contended that ". . . we didn't focus on that word . . ." (E. 35), he did not explain why the word "blackmail" was featured in a caption or subheading (E. 212). Mr. Skolnik, who has three degrees, including a Ph.D., said he understands that blackmail ". . . is somewhat in the category of a crime . . ." (E. 32).

Mr. Skolnik had previously testified at his deposition prior to trial that he didn't know to whom Mrs. Bergemann was referring when she used the word "blackmail", as he wasn't at the meeting (E. 39). At the trial he said he "now recollect(s)" that he was there for at least part of the meeting (E. 39).[8]

[8] Mr. Skolnik likewise precluded further examination at the same deposition concerning another article published in the News Review, by disclaiming knowledge of who wrote it (E. 86). At the trial he admitted that he "may have written most of this" (E. 87). In neither case did he notify respondent before trial that his answer was incorrect.

Mayor Smith, who testified for petitioners, said he presided at the meeting and that: "In my opinion there was nothing to justify the use of the word 'blackmail' by anyone from the audience" (E. 132). He further said: "— there was nothing that I know of, that they had any fact that they had, which would justify the use of the word 'blackmail'. If they had something other than what they had presented at the Council" (E. 132). He also said: "I would say that based on the fact and information that we had, that 'blackmail' or 'blackmailing scheme' was too strong a word."

However, petitioners' witness, Mrs. Skolnik, when asked if the word "blackmail" was a proper description of respondent's actions, replied: "In the context of the meeting, yes, it was proper" (E. 185). She also knew that blackmail "could be a crime" (E. 184).[9]

Mr. Skolnik defended the use of the word "skulduggery" in the second article (Pl. Ex. 2, E. 216-219) with the statement that it "is the word that the reporter (Mrs. Williamson) used to interpret what Mr. Herling was saying" (E. 43). Mrs. Williamson, petitioners' witness, denied this. Her testimony was (E. 152):

> "Q. You said here also 'Albert Herling suggested skulduggery'.
>
> A. *I did not use that word.* This is a good example of what happens on Tuesday night when the other members of the Editorial Board will read through an article. Apparently it was an effort to shorten. This was quite a long article and this is somebody else's phrase. That I do recall.
>
> Q. So the article you wrote and has your by-line on there—

[9] Petitioners' brief alleges (p. 24) that: "The uncontradicted evidence is that it did not occur to anyone on the News Review that the word 'blackmail' might be understood in the criminal sense in the context in which it was used."

A. Right.

Q. —uses a word you didn't write in the article, that is 'skulduggery'?[10]

A. *That often happens;* yes."

Mrs. Williamson justified her repetition of the word "blackmail" in her article on the ground that ". . . I paraphrased his sentence but I selected out the word 'blackmail' was his word and I wanted to denote it was his word I was picking up . . ." (E. 152).[11] She saw nothing wrong in doing so as "The word 'blackmail' had been quoted from the week before" (E. 154). She further testified that "There is no connection as far as I can see between what Mr. Bresler, what the situation — the offer, there is no relation between that and a crime of blackmail. There is a difference" (E. 155). Her article also noted that "The mayor occasionally had to caution them to refrain from engaging in personalities." (E. 217).

News Review Sponsorship of Lawsuit

One of the unusual aspects of this case was the active participation of the News Review in sponsoring and collecting funds for the filing of a lawsuit against respondent (and others). The suit contained serious charges of fraud, misrepresentation, etc., and claimed damages in excess of two million dollars, with an incidental claim for injunctive relief. Four of the apparently unwilling plaintiffs

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[10] Mr. Skolnik defined the word "skulduggery" as "something amiss, something improper perhaps" (E. 42). The Court of Appeals quoted two dictionary definitions of the word (E. 300), and said there is little doubt that the word was intended to indicate dishonest conduct on the part of Bresler and to hold him up to ridicule and contempt.

[11] Mayor Smith testified that Albert Herling, who was quoted as making the blackmail accusation (and who serves with Mrs. Skolnik and GHI President Schwan on the Steering Committee of CFPG), would be known by anyone who attends city council meetings as having "made some pretty sweeping statements before" (E. 130).

withdrew before and during trial, and the trial court granted a directed verdict against the remaining plaintiffs, which was not appealed.

Mr. Skolnik testified that Mayor Smith had suggested the suit to supplement the city's suit against respondent (E. 65, 67). Mayor Smith denied this (E. 127). Mr. Skolnik's sworn answers to interrogatories disclosed that the legal fund had been initiated by Mr. Stern and Mrs. Skolnik (E. 184), both members of the staff of the News Review and the Steering Committee of CFPG.

Petitioner Skolnik was asked if he and his wife assisted in any way in the collection of the legal funds, and he answered: "I don't recall any activity in that respect" (E. 62). When questioned further about one of the News Review articles which solicited legal funds and listed three unidentified telephone numbers to call, he said "The latter number is my wife's number" (E. 62). When asked further, "You don't have separate telephones?", he said "That is right" (E. 63). When asked about another article which solicited legal funds and listed two unidentified numbers to call, he again said "One of the numbers is my wife's number."

Mr. Skolnik testified that it was a suit in equity for an injunction (E. 65). When asked if there was any other purpose in bringing the suit, he answered "Not that I know of" (E. 66).

Petitioners concealed the true purpose of the lawsuit, and collected funds by misrepresenting in the News Review that they were to be used for the purpose of enjoining "actions of developers which are contrary to the Greenbelt Master Plan" (E. 230). In another article published two weeks later, the News Review again misrepresented the purpose for which the funds were to be used, by describing it as "legal action to maintain the garden-city character

of Greenbelt and to help realize the City's Master Plan" (E. 68-69). The suit did not even mention the city's master plan.

Petitioners' brief alleges, p. 14, that there was no evidence that anyone on the News Review knew of the nature of the suit before it was filed. That was true of Mrs. Williamson, who wasn't told that the funds would be used to sue Mr. Bresler for damages in excess of a million dollars (E. 153). It was also true of Mrs. Sucher, who wouldn't have contributed if she had known one of her neighbors was also a defendant in the suit (E. 167). It is not true of petitioner Skolnik, who again misrepresented the nature of the suit in his sworn answers to interrogatories filed *after* the suit was filed, in which he stated (E. 70): "On information and belief, monies from said fund have been used in part at least to support an action by interested citizens based upon the covenants and the agreement between plaintiff, his wife and the City, i.e., Dennis, et al. versus Bresler, et al." Skolnik even concealed the names of other defendants, who were not parties to the covenants nor to any agreement with the city, and who had no financial interest in the property concerned. And, on the witness stand, he again misrepresented it to be a suit for injunction, and for no other purpose (E. 65-66).

It is also incredible that Mr. Stern and Mrs. Skolnik, who *were* on the News Review, and who initiated the lawsuit, and who were members of the Steering Committee of CFPG which collected and disbursed the funds for the lawsuit, didn't know the nature of the suit before it was filed.

Petitioner Skolnik further testified that he did not know of any other suits supported by the CFPG legal fund against other developers who were developing in Greenbelt contrary to the city's master plan (E. 80).

The Covenants Controversy

Petitioners describe the covenants controversy — which had no relation to the "blackmail", or "skulduggery" accusations, or the false reports of lawsuits — so as to picture respondent as one who violated his agreement with the city.

Respondent signed the covenants with the promise that the city "was going to get the same covenants from everybody" (E. 99-100). Petitioners' witness, Lewis Bernstein, the former City Planning Board Chairman and City Councilman, confirmed this when he acknowledged that respondent "Would be afforded no more or no less, no worse or no better treatment than any other developer in the City of Greenbelt" (E. 144). However, a few months after respondent signed the covenants limiting himself to an *average* of 7 units per acre for 50 acres, the city approved 12 units per acre for another developer, Lakeside North (E. 145). When he notified the city by registered mail that he intended to build a high-rise with 178 units, in addition to the 144 townhouses he had built as promised (and still less than the 350 total he had agreed to), and the city made no objection within 30 days as it was required to do by the covenants, he started construction.

The city filed suit to enjoin construction of the apartment house.[12] It did not attempt to enjoin the owner of Lakeside

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[12] In that case, the city represented to the trial court and the Court of Appeals (City of Greenbelt v. Bresler, 248 Md. 210, 236 A. 2d 1) that it did not file suit until March 1966 because it did not learn that Bresler intended to build a high-rise apartment until they were informed on January 17, 1966. Petitioners' witness, Mayor Smith, repeated that statement in his testimony in this case (E. 123). As the Court of Appeals noted (E. 284), Mayor Smith admitted on cross-examination that the City Manager's report to the Mayor and Council dated October 22, 1965 (Pl. Ex. 34, E. 123-124) stated that Bresler intended to construct a "High Rise 183 units" and the city attorney had been requested to take action to enforce the covenants. Mayor Smith assumed that he received a copy of that report, as he normally does (E. 124).

North, who had agreed to build "townhouses, not garden apartments" (E. 141), but who "didn't keep his word either" (E. 142).

Petitioner Skolnik justified the News Review's failure to launch a corresponding attack on Lakeside North's higher density and breach of agreement on the ground that they were "in the periphery of town" (E. 37), although he admitted that Parcels 1 and 2 were also in the periphery (but adjacent to GHI property).

ARGUMENT

Out of Context

Petitioners' first and apparently principal argument in their brief alleges (p. 24): ". . . the lower court's total disregard for the context of the articles . . .". That argument is contrary to the record. The lower court clearly and explicitly instructed the jury (E. 189) that:

> "In considering the publication complained of, *you must consider the publication as a whole* — the Court would say in this case we are talking about serious (series) of publications — and determine the meaning of the publication and how it would be understood by ordinary readers from the *entire context* thereof with the other facts and circumstances shown by the evidence." (Emphasis supplied.)

Paradoxically, it was petitioners who took the word "blackmail" out of context in the first article and featured it as a caption in heavy type (E. 212).

Paradoxically, it was petitioners' reporter who took the word "blackmail" out of context in the second article and "selected out" that word (E. 152).

In *Dorr v. United States*, 195 U.S. 138, 153, the Court said: "And all sensational headings to reports should be avoided . . . These headlines were not privileged matter

at the common law, and were libelous remarks or comments if the matter could be deemed otherwise privileged . . .".

Petitioners cite 33 Am. Jur., Libel and Slander. That same authority, at Sec. 190, Headlines to Privileged Matter, states:

> "The headlines of an article, the publication of which is protected by a qualified privilege, may be libelous as exceeding that privilege. They are privileged only when they are a fair index of a truthful report . . .".

Likewise, 39 Am. Jur., Newspapers and Press Associations, Chapt. VII, Libelous Publications, Sec. 30, Reports of Public Proceedings, Meetings, etc., states:

> "Nor have newspapers and similar publications any special privilege in respect of comments on matters of public interest; on the contrary, it seems to be definitely settled that their rights in this regard are no greater than those of any private individual . . . one who desires to keep within the realm of privilege must not only make his report fair and true, but must also avoid the use of libelous headlines or captions."

Petitioner Skolnik and his witnesses knew that blackmail is a crime. All of them (with the exception of Mrs. Skolnik) testified that there was no relation between respondent's proposal and the crime of blackmail. The caption or subheading "Blackmail" was not a fair index of the matters being discussed, and was not privileged.[13]

Repetition of False Statements

Petitioners' brief asserts their right to publish ". . . an accurate report of such clear expressions of opinion re-

[13] When the trial court asked counsel for the petitioners if there was any contention of truth, he said (E. 186): "What I am saying is we don't contend that the plaintiff committed blackmail, that is all. We don't intend (contend) the plaintiff committed the crime of blackmail."

garding a public proposal that is fully and accurately described . . ." (p. 25).

Petitioners' insertion of the word "skulduggery" in the article written by Mrs. Williamson was neither accurate nor true. It was a knowingly false charge of dishonesty which was falsely attributed to the speaker (E. 152-153).

Petitioners' insertion of the caption "Blackmail" in the first article had nothing to do with any public proposal, and was not a report of an expression of anyone's opinion except the newspaper's. The allegedly public issue which was discussed was not whether respondent was guilty of blackmail (or skulduggery).

Prosser, The Law of Torts, 2nd Ed., states:

> "Thus qualified privilege does not extend, in any of the above cases, to the publication of irrelevant defamatory matter with no bearing upon the public or private interest which is entitled to protection; . . ." (Sec. 95, p. 625).
>
> "It must rather be directed and confined to the facts which are a matter of public concern, and not go beyond them, as by attacking the personal character of the author of a book . . ." (Sec. 95, p. 623).

Likewise, the false reports of lawsuits and "legal proceedings" allegedly filed against respondent (E. 223, 227) had no relation to any public proposal, or public issue, or matter of public interest (nor to any official conduct).

Public Officials and Public Figures

Although *Curtis Publishing Co. v. Butts,* and its companion case, *Associated Press v. Walker,*[14] 388 U.S. 130

[14] The firm of Royall, Koegel, Rogers & Wells was of counsel for petitioners in this case when it was before the trial court and the Maryland Court of Appeals. William P. Rogers, a member of the firm at the time, represented the Associated Press in the companion case to *Butts.*

(1967), 87 S. Ct. 1975, was decided almost six months before this case was tried; and although counsel for respondent admitted in his opening statement that respondent was a public figure;[15] and although the Maryland Rules provide that amendments may be made orally in open court, at any time before the jury retires to make up its verdict, and that leave to amend shall be freely granted (Md. Rule 329, c, d) — petitioners never asked for leave to add the constitutional defense of "public figure" to their constitutional defense of "public official" (E. 6).[16]

It will also be noted that petitioners did not cite *Curtis Publishing Co. v. Butts, supra,* in their requests for instructions on the question of "actual malice" (E. 8-9). The *only* cases they cited in support of those requests were *New York Times v. Sullivan,* 376 U.S. 254; *Rosenblatt v. Baer,* 383 U.S. 75; *Garrison v. Louisiana,* 379 U.S. 64; and *Beckley Newspapers v. Hanks,* 389 U.S. 81. Those cases all dealt with actions against critics of the *official* conduct of public officials.

It was petitioners' citation of cases dealing *only* with criticism of official conduct, and their erroneous insistence that the *New York Times* rule applied in all its rigor to *all* libel cases, that lead to the following colloquy (E. 201):

> "(The Court) You object to—
>
> (Mr. Clark) Yes. That statement does not make it clear to the jury that under the constitution actual malice is *limited* to knowledge of the truth or reckless disregard of the truth.

---

[15] The trial court twice instructed the jury that ". . . opening statements or closing argument of counsel is not evidence" (E. 198-199).

[16] In *Butts,* the Court said: "Before we reach the constitutional arguments put forward by the respective petitioners, we must first determine whether Curtis has waived its right to assert such arguments by failing to assert them before trial." 388 U.S. at 142, 87 S. Ct. at 1985.

(The Court) In other words, what you are saying to me is knowledge of it being false and reckless disregard of whether it is true or false by the — are the elements of malice.

(Mr. Clark) The *only* evidence (elements) of malice." (Emphasis supplied.)

The trial court did not agree with that contention. Neither did the majority opinion of Mr. Justice Harlan in *Butts*, which said that:

"... to take the rule found appropriate in *New York Times* ... as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc. v. Hill*, supra, 385 U.S. at 390, 87 S. Ct., at 543 we counseled against 'blind application of *New York Times Co. v. Sullivan*' and considered 'the factors which arise in the particular context.'" 388 U.S. at 148, 87 S. Ct. at 1988.

In *New York Times*, the Court repeatedly stated that the rule of constitutional protection announced in that case applied to actions brought by public officials against critics of their *official* conduct. 376 U.S. at 256, 264, 268, 273, 279, 282, 283; 84 S. Ct. at 713, 717, 719, 722, 725, 726, 727.

In *Butts*, Mr. Justice Harlan noted that (388 U.S. at 133, 87 S. Ct. at 1980):

"The sweep of the *New York Times* rule in libel actions brought under state law was a question expressly reserved in that case, 376 U.S. at 283, n. 23, 84 S. Ct., at 727, and while that question has been involved in later cases, Garrison v. State of Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125; Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597; Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456, it has not been fully settled."

If, as they indicated, petitioners were relying *only* on the *New York Times* rule as announced in that case and the other cases cited by them, their objection was improper, as none of the publications were directed at the official conduct of respondent. And, some of the articles clearly showed that they were directed at the private conduct of respondent, which the concurring opinion of Mr. Justice Goldberg in *New York Times* stated was not constitutionally protected. 376 U.S. at 301, 84 S. Ct. at 737.

On the other hand, if petitioners were also relying on the "public figure" constitutional defense, their objection likewise was not well taken. The majority opinion of Mr. Justice Harlan in *Butts* made it abundantly clear that actual malice in the case of public figures is not limited to knowledge of falsity or reckless disregard of truth, nor are they the only elements of malice. As the opinion stated:

> "... the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. at 155, 87 S. Ct. at 1991.

However, the question of "public figure" is largely academic in this case, as petitioners elected not to rely on *Butts* in requesting instructions on actual malice, and to reject the "highly unreasonable conduct" criterion of *Butts*.

And, if petitioners were relying on "public interest" as a constitutional defense, it did not extend to false accusations of lawsuits, nor to alleged private violations of county building standards, nor to captions and other accusations of

crime which were not relevant to the matters being discussed, nor to respondents' own accusation of "skulduggery".

Actual Malice

Petitioners claim the trial court erred in describing to the jury what is said was a *definition* of malice (E. 192-193). However, its final instruction to the jury (E. 209) clearly stated:

> "I am going to give you the additional instruction, *which is the law on this subject.* There is no contention here that the statements regarding blackmail were true. The Constitutional guarantee requires a rule that prohibits a public official or public figure from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statements were made with actual malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not. The same thing is said in the same vein, *definition of malice is constitutionally insufficient* where discussion of public affairs is concerned unless the plaintiff establishes that the utterances were false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false."

This charge was clear and explicit, and in the exact language of *New York Times* on public official, public figure, and public affairs. It was broader than petitioners were entitled to under the circumstances of the case. And, it was given special emphasis as an additional instruction and the last one which the jury heard before it retired to consider its verdict.

Despite the fact that the trial court had stressed to the jury that its final instruction was "the law on this subject", and that the *definitions* of malice which it had previously discussed with the jury were "constitutionally insufficient

where discussion of public affairs is concerned" (E. 209), petitioners objected to previous references allegedly made to "evil motive", "ill will", and "hostility", (E. 210). The trial court did not use the words "evil motive" in its instructions. Nor did it use the words "ill will" (which presumably would include "hostility"), which *were* used by the Court in *Butts*, when it said:

> "Moreover, punitive damages require a finding of 'ill will' under general libel law and it is not unjust that a publisher be forced to pay for the 'venting of his spleen' in a manner which does not meet even the minimum standards required for constitutional protection." 388 U.S. at 161, 87 S. Ct. at 1994.

The Brief for Petitioners alleges a *single* error in the instructions given by the trial court, described as (p. 3):

> (a) By instructing the jury that "actual malice" which would permit recovery consists of "a state of mind . . . best described as spite, hostility, or deliberate intention to harm" that could be inferred from the language of the publications in issue:

The opinion of Mr. Justice Brennan in *New York Times* also referred to ". . . the state of mind required for actual malice . . ." 376 U.S. at 287, 84 S. Ct. 730. That is what the trial court apparently intended to convey to the jury when it preceded the allegedly erroneous *definition* of actual malice with the statement: "Therefore, the court will now again *define* for you another indication of what malice is", and followed it with a paraphrase of Mr. Justice Brennan's opinion: "By these *definitions* you can easily see that actual malice does involve a state of mind" (E. 193) (emphasis supplied).

This Court has not changed the *definition* of "malice" or "actual malice". What it said in *Rosenblatt v. Baer, supra*, was that "(This) definition of malice is constitutionally in-

sufficient where discussion of public affairs is concerned . . ." 383 U.S. at 84, 86 S. Ct. at 675. That is the exact phrase which the trial court used in its final instruction to the jury (E. 209), and which it followed with the exact language of the *New York Times* rule.

Presumably, state law standards of libel have not been nullified by this Court when they do not encroach on the constitutional protections announced by this Court pertaining to criticism of public officials, or official conduct, or public figures, or public issues, or public affairs. As the Court of Appeals noted, there were other publications unrelated to public matters which were ". . . injurious to Mr. Bresler in his business as a contractor and were libelous per se" (E. 294). Likewise, as that Court pointed out, the protection does not extend to the publication or repetition of defamatory matter which is irrelevant to the public issues being discussed.

Instructions as a Whole

Petitioners' primary argument is that the word "blackmail" was taken out of context. The same complaint might be made of petitioners. Their single assignment of error, allegedly made by the trial court in the instructions it gave, apply to definitions by that court which they have taken out of context.

In *Butts*, Mr. Justice Harlan stated:

> "The impact of a jury instruction 'is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied.' Seaboard Air Line R. v. Padgett, 236 U.S. 668, 672, 35 S. Ct. 481, 482, 59 L. Ed. 777." 388 U.S. at 156, 87 S. Ct. at 1992.

As the Court of Appeals noted, the trial court instructed the jury a number of times (eight — E. 191, 191-192, 192,

192, 193, 197, 204 and 209) substantially in the language of the *New York Times* test. As that Court said (E. 316):

> "Indeed in several instances the test was broader than that of *New York Times* as it was not always limited to a 'public official' or a 'public figure'.[17] This however, was favorable to the defendants and injurious, if at all to the plaintiff, and, as we have stated, the appellants cannot complain of this."

In addition, the trial court gave the jury numerous instructions on the right of the press to comment upon and criticize matters of public interest freely and openly; to rely upon people it knows or has very good reason to believe are responsible citizens; immunity with respect to foolish and prejudicial criticism; fair comment; privilege; preponderance of evidence; and burden of proof.

The trial court attempted in good faith to instruct the jury fairly and thoroughly. It had read carefully all the Supreme Court cases cited by respondents in their requests for instructions (and *Butts*, which they had not cited), had conducted an extensive discussion of its proposed instructions with counsel in chambers, and attempted with manifest justice to apply the law to the evidence in this case. Its repeated instructions in the substantial language of *New*

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[17] The Court of Appeals expressed grave doubts that Bresler was a "public official" or even a "public figure". As that court noted (E. 296), respondent was not a "public official" of Prince George's County, but was a member of the House of Delegates from Montgomery County, and substantially all the libels were published some *seven months before* he was asked to run for Comptroller. In *Rosenblatt v. Baer*, 383 U.S. at 85, 86 S. Ct. at 675-676, the opinion of Mr. Justice Brennan stated that the public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. (Mr. Justice Brennan also noted that: "Since *New York Times* had not been decided when his case went to trial, his presentation was not shaped to the 'public official' issue". 383 U.S. at 87, 86 S. Ct. at 676).

York Times, can only, if at all, be criticized because the court reporter designated the trial court's pauses with a comma instead of a dash, e.g.:

> (E. 192) — "You are instructed the publication is qualified privileged and your verdict should be for the defendant unless you find again the publication was with actual malice, knowledge of its being false or reckless disregard of whether it was true or false."
>
> (E. 197) — "With the law that I have given you you are obligated to find malice, knowledge of the falsity, reckless disregard of what is true or false in order to find (for) the plaintiff."
>
> (E. 204) — "And the plaintiff cannot recover unless you find, as I say again, by a preponderance of the evidence, that the articles were published with actual malice, knowledge of their being false, or reckless disregard of whether they were true or not."

It will be noted that the trial court, contrary to petitioners' contention, did not say actual malice *or* knowledge of falsity *or* reckless disregard of truth in the above instructions, but used the word "or" only between knowledge of falsity and reckless disregard of truth, pursuant to the phraseology of *New York Times*.

Despite its undue repetition of the *New York Times* instruction, and its attendant unfairness to respondent under the facts in this case, the trial court gave another and final instruction to the jury (E. 209), in which it *twice more* repeated the *New York Times* instruction in the precise language used by the Court in that case.

As the Court of Appeals said (E. 305): "In the present case, the trial court gave a comprehensive and carefully considered charge to the jury." And, as it further said (E. 318): "In our opinion, the appellants suffered no prejudice from the instruction, considered as a whole, in this regard.

If there was any prejudice, it was suffered by the plaintiff, not by the defendants."

It is noteworthy that (all former) Chief Justice Warren and Justice Clark joined in the dissenting opinion of Justice Fortas in *Time, Inc. v. Hill*, in which he said: "But a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters . . . The English language is not so esoteric as to permit serious consequences to turn upon a supposed difference between the instructions to the jury and this Court's formulation." 385 U.S. at 418, 420, 87 S. Ct. at 557, 558.

Opportunity to Rebut

One of the principal reasons former Chief Justice Warren gave for adhering to the *New York Times* standard in the case of "public figures", in his concurring opinion in *Butts*, was because: "And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." 388 U.S. at 164, 87 S. Ct. at 1996.

The Greenbelt News Review is the only newspaper published in Greenbelt. It is the only newspaper published in the metropolitan area which is regularly distributed to every house in Greenbelt. None of the other newspapers distributed in Greenbelt had published any of the accusations made in the News Review concerning respondent. And, as the Court of Appeals stated (E. 299):

> "Nor was it likely that *Bresler, himself*, would have access to the News Review to present his position in the matter and show that he had not committed blackmail, was not guilty of skulduggery or had not been sued for failure to carry out the county building requirements,

in view of the refusal of the News Review to permit him to subscribe to it, even though it did mail some 75 copies of the publication to others at a nominal charge."

In *Time, Inc. v. Hill,* the opinion of Mr. Justice Brennan stated:

> "Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved Cf. Rosenblatt v. Baer, 383 U.S. 75, 91, 86 S. Ct. 669, 679, 15 L. Ed. 2d 724 (Stewart, J., concurring)."[18] 385 U.S. at 391, 87 S. Ct. at 543-544.

Comparison with New York Times and Butts

The Court's warning against "blind application of *New York Times Co. v. Sullivan*" in *Time, Inc.* and *Butts* is appropriate because of a number of substantial differences between *New York Times* and this case, e.g.:

1. *New York Times* involved a single publication.

2. *New York Times* involved criticism of the official conduct of a public official.

3. In *New York Times* the Court commented on ". . . Times' policy of rejecting advertisements containing 'attacks of a personal character' . . ." 376 U.S. at 287 n. 27, 84 S. Ct. at 730.

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[18] Mr. Justice Stewart commented that: "Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." 383 U.S. at 94, 86 S. Ct. at 680. That reference to the 1950's was particularly appropriate to this case. Not only did the News Review spread panic and hatred among Greenbelt's residents; "guilt by association" was revived when others beside Bresler were named as co-defendants and falsely charged with fraud in the lawsuit promoted by the News Review.

4. In *New York Times* the Court said "There was no reference to respondent in the advertisement, either by name or official position." 376 U.S. at 288, 84 S. Ct. at 730.

5. In *New York Times* the Court noted that, of the Times total circulation that day of approximately 650,000 copies, only about 35 copies were distributed in Montgomery County, Alabama. 376 U.S. at 260 n. 3, 84 S. Ct. at 715.

6. In *New York Times* there appeared to be no accusation that Commissioner Sullivan had committed any crime.

7. In *New York Times* there was no evidence of malice at the time of publication, and the Court said respondent's own proofs tend to show that the advertisement was substantially correct. 376 U.S. at 286, 84 S. Ct. at 729.

8. The New York Times was a daily newspaper.

There are also substantial difference between *Butts* and this case, e.g.:

1. *Butts* involved a single publication.

2. In *Butts* there was no accusation that he had committed a crime.

3. In *Butts* there was a defense of "substantial truth". 388 U.S. at 137, 87 S. Ct. at 1982. (As the Court of Appeals noted in this case, petitioners did not object to the trial court's instruction to the jury (E. 319-320) that: "Going to the factor of the truth, there is no contention in this case, it is conceded by the defendant these allegations were not true. That is that Mr. Bresler was guilty of blackmail.")

4. In *Butts*, the Court noted that: "He (counsel for Butts) did not seriously contend that the Saturday Evening Post was actuated by pre-existing animosity toward Butts." 388 U.S. at 156 n. 20, 87 S. Ct. at 1992.

5. In *Butts,* the Court stated that : . . . both (Butts and Walker) commanded sufficient continuing public interest and had sufficient access to the means of counter-argument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." 388 U.S. at 155, 87 S. Ct. at 1991.

6. In *Butts,* the Court noted that: "Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures or matters of public interest." 388 U.S. at 155 n. 19, 87 S. Ct. at 1992. (The Court of Appeals held that several of the allegations were libels *per se* on respondent in his business as a contractor.)[19]

The Court of Appeals Decision

Not only was the decision of the Court of Appeals a unanimous one (E. 265), it was an extensive opinion which showed that the appellate court had likewise given careful and thorough consideration to the decisions of this Court. In turn, its discussion of the evidence (E. 265-288) and the errors alleged by petitioners (E. 288-320) deserve the careful consideration of this Court.

With reference to petitioners' contention that the word "blackmail" was used in a non-criminal sense, the court said that the intended meaning was for the jury to determine, and that the jury had been instructed to determine the meaning from the entire context of the publications.

The court noted that, as early as 1883, the Court of Appeals of Maryland, in *Negley v. Farrow,* 60 Md. 158, had

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[19] As the Court of Appeals noted (E. 295), the rule on libels pertaining to those engaged in business was specifically applied to contractors in other jurisdictions; *Plenol, v. Beuttler,* 253 Iowa 259, 111 N.W. 2d 669 (1961); *Schneidman Heating, Inc. v. New York Plumbers' Specialities Co.,* 238 App. Div. 318, 264 N.Y.S. 146 (1933); *Williams v. Daily Review, Inc.,* 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965).

recognized "the right of the defendants to discuss and criticize boldly and fearlessly the official conduct of the plaintiff." However, it said that respondent was not a "public official" of Prince George's County, but a member of the Maryland House of Delegates from Montgomery County; that substantially all of the libels were published some *seven months before* he was asked to run for Comptroller of Maryland; that the articles were directed at respondent as a *private developer* of land in the Greenbelt area; and that there was no suggestion that he had any political or other prominence at the national, state, county or municipal level. Nevertheless, the Court of Appeals assumed *arguendo* that respondent was a public official and a public figure within the meaning of *New York Times, Butts,* etc., and said that the instructions given had met those constitutional tests.

The decision said that the original use of the term "blackmail" was intended to import serious criminal conduct on respondent's part, and there was evidence from which the jury could and did find that this charge was false, and known to be false, but was published with actual knowledge of its falsity or with reckless disregard of whether it was true or false. As the court said, it would be difficult to conceive of a case in which there was more convincing evidence — the admissions of one of the petitioners and several of their witnesses — that the petitioners did indeed have actual knowledge of the falsity of the charge or, in any event, entertained serious doubts of its truth.

The Court of Appeals also said there were sufficient facts to indicate to the jury a desire on the part of the publishers of the News Review to injure respondent's reputation through the use of false charges.

The appellate court reviewed the trial court's instructions in detail, and found that the entire charge clearly in-

structed the jury that, in order for respondent to recover, it must find by a preponderance of the evidence that the *New York Times* test had been established for *both* Bresler's activities as a public official and as a public figure, and that this was a *more favorable* instruction than petitioners were entitled to receive in light of the factual circumstances. It said that the trial court adopted, in effect, the position of former Chief Justice Warren in *Butts* and *Walker* with reference to "public figures". It further said that, considering the instruction as a whole, if there was any prejudice, it was suffered by respondent, not petitioners.

In conclusion, the appellate court said that the subheading "Blackmail" was not used as an expression of opinion by any one other than the publishers themselves, that they knew it was false but emphasized the charged in a subheading, and that the jury could well have found that the charge was published with a reckless disregard of truth.

Petitioners' Appendix A

Petitioners reprinted several newspaper articles and editorials in Appendix A to their brief (A. 1-11), in support of their apparent contention that accusations of "blackmail" are not libelous because they are frequently made. All the articles quoted differ substantially from the facts in this case. Five of them criticize the *official* conduct of U.S. Representatives and a U.S. Senator, and none of the remainder accuse any individual by name.

Petitioners cite no authorities in support of the premise that conduct frequently engaged in by others renders it legally permissible.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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